IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0113
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
DEBRA LYNN VENABLE,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20053031

Honorable Christopher C. Browning, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Alan L. Amann
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan L. McCaffery
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 Appellant Debra Venable appeals her convictions on one count each of possession of a dangerous drug and possession of drug paraphernalia, claiming the state's prosecution of both charges was duplicitous. We affirm.

Factual Background

¶2 On April 9, 2005, Tucson Police Officer Brandon Angulo stopped a vehicle with invalid license plates and arrested the driver, Thomas Dollarshell, for driving with a suspended license. Angulo then searched the car and found a black wallet, several syringes, cotton, and a spoon in the center console. In the wallet was a pink plastic bag containing a "white, crystal-like substance." Later testing confirmed the bag contained 2.7 grams of methamphetamine and one of the syringes also contained methamphetamine. Angulo found a section of a drinking straw containing visible residue in a purse sitting on the passenger seat. Dollarshell claimed he had borrowed the car but would not say from whom. Debra Venable, his passenger, said the car as well as the wallet and the purse belonged to her and the drugs did not belong to Dollarshell.

¶3 A grand jury heard testimony about the bag of methamphetamine and the straw but not the syringes. Based on this evidence, the grand jury indicted Venable on one count of possession of a dangerous drug, methamphetamine, and one count of possession of drug paraphernalia, the bag "and/or" the straw. At trial, the state presented evidence about the bag of methamphetamine and the straw. Venable introduced evidence of the syringes. The jury

found Venable guilty of both counts. The trial court suspended the imposition of sentence and placed her on 18 months' probation and ordered her to pay $3,145 in fees and fines.

Discussion

¶4 Relying on *State v. Schroeder*, 167 Ariz. 47, 804 P.2d 776 (App. 1990), and *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003),Venable maintains the state's prosecution of both charges was duplicitous. "An indictment which charges two or more distinct offenses in a single count is duplicitous." *Schroeder*, 167 Ariz. at 51, 804 P.2d at 780. Duplicitous indictments may cause prejudice to a defendant on three grounds: inadequate notice of the charge, insufficient protection against double jeopardy, and lack of a unanimous jury. *Id.*

¶5 The state argues that Venable forfeited her claims of duplicity because, as she admits, she did not object to the indictment in the twenty-day pretrial period established by Rule 16.1(b), Ariz. R. Crim. P., 16A A.R.S., as incorporated by Rule 13.5(e), Ariz. R. Crim. P., 16A A.R.S., which instructs that defects in charging documents must be raised pursuant to Rule 16. "By failing to object before trial and later seeking dismissal of allegedly duplicitous counts, a defendant . . . avoids the potential of multiple punishments by depriving the State of the opportunity to amend, and then attempts to avoid any punishment at all." *State v. Anderson*, 210 Ariz. 327, ¶ 17, 111 P.3d 369, 378 (2005). As a result, a defendant who fails to object to an indictment typically waives any error. *State v. Rushton*, 172 Ariz. 454, 455, 837 P.2d 1189, 1190 (App. 1992). We agree with the state that Venable has

waived her challenge to the indictment, except for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).[1]

¶6 However, our supreme court has also found duplicity when an indictment facially charges only one crime, but the prosecution presents evidence of more than one crime at trial. *State v. Davis*, 206 Ariz. 377, ¶ 61, 79 P.3d 64, 77 (2003). When "'the evidence shows, or tends to show, that several [criminal] acts . . . have occurred . . . , it is incumbent upon the prosecution to elect which one of such acts it relies upon for a conviction.'" *Id., quoting Hash v. State*, 48 Ariz. 43, 50, 59 P.2d 305, 308 (1936). Thus, "the heart of [the] complaint" is not the form of the indictment, "but rather a duplicitous charge, which led to a non-unanimous jury verdict" that constitutes fundamental error. Davis, 206 Ariz. 377, ¶ 63, 79 P.2d at 77.

¶7 Venable argues that, although the indictment on count one charged only one offense, possession of methamphetamine, the prosecution presented evidence of two crimes of possession of methamphetamine in both the plastic bag and the syringe, making the prosecution of count one duplicitous. The record, however, undercuts her claim. The prosecution presented evidence only of the methamphetamine in the bag, not of the methamphetamine in the syringe and relied on only this evidence for conviction. Therefore,

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[1]A recent decision of this court notes that this view may be a generous reading of Arizona law: "[O]ur supreme court has recently used terminology suggesting, but not expressly concluding, that unpreserved claims of error concerning a defect in the charging document might not be subject to review of any kind." *State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.3d 1177, 1178 (App. 2006).

the prosecution of count one was not duplicitous. Evidence of the syringe was introduced solely by Venable, and she may not profit from having injected extraneous evidence into the proceedings and now characterizing it as reversible error. *See State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001) (purpose of invited error doctrine to ensure parties do not profit on appeal from error they introduce).

¶8 Further, even if the evidence was arguably duplicitous, Venable's right to a unanimous jury was not compromised. During her closing argument, the prosecutor emphasized that the jury should concern itself only with the methamphetamine found in the plastic bag as evidence for this count, and the judge instructed the jury it could find Venable guilty only if it found the state met its burden of proof on each element of the crime and that one element of the crime of drug possession is that the defendant possessed a "usable amount" of the drug in question. The jury had no evidence of the amount of methamphetamine in the syringe. Moreover, even if the jury nevertheless believed Venable possessed the drug in the syringe, the jury was properly instructed and we presume it followed the court's instructions. *See State v. Ramirez*, 178 Ariz. 116, 127, 871 P.2d 237, 248 (1994) ("[A]bsent some evidence to the contrary, we presume that the jury read and followed the relevant instruction."). We therefore find no fundamental error in the prosecution of count one.

¶9 Venable also claims the indictment for possession of drug paraphernalia was duplicitous, pointing out the indictment read "baggie and/or straw," thus charging up to two

offenses, possession of the plastic bag and possession of the straw. This situation presented Venable with the choice outlined in *Anderson*; that is, she could have challenged the indictment and sought separate charges at the outset. By not doing so, Venable waived her objection on this ground. *See Rushton*, 172 Ariz. at 455, 837 P.2d at 1190. Pursuant to *Davis*, we review the record for fundamental error in the form of violations of constitutional rights. 206 Ariz. 377, ¶ 64, 79 P.3d at 77. We will reverse for fundamental error only when the defendant establishes resulting prejudice. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶10 Venable suffered no prejudice regarding count two. She does not claim lack of notice, and she is not at risk for double jeopardy on this charge. Having presented evidence of both the plastic bag and the straw against her, the state may not press either of these charges anew. *See Schroeder*, 167 Ariz. at 52, 804 P.2d at 781. Nor did the indictment compromise Venable's right to a unanimous jury verdict. There was overwhelming evidence against her on both counts, including her own statements of ownership. Even were it possible the jurors did not unanimously believe Venable possessed the straw or believed it was not paraphernalia as the defense argued, because the jury unanimously found her guilty of possessing the methamphetamine found in the plastic bag, the jury had to have concluded that she possessed the bag as well. Accordingly, she has demonstrated no fundamental error.

Disposition

¶11 Venable's convictions and her placement on probation are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge